IN THE SUPREME COURT OF FLORIDA

EUGENE R. O'NEAL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 87,858

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On February 8, 1995, the State Attorney in and for the Tenth Judicial Circuit, Polk County, filed an information against Petitioner, EUGENE R. O'NEAL, charging him with one count of possession of cocaine within 1000 feet of a school with intent to sell or deliver and sale of cocaine within 1000 feet of a school, both contrary to section 893.13(1), Florida Statutes (1993). Petitioner filed a motion to dismiss. Petitioner argued the time of the alleged sale of cocaine within 1000 feet of a school, 11:46 p.m., did not fall within the statutory period of "between 6:00 a.m. and 12 a.m." and that the term "12 a.m." was unconstitutionally vague.

On June 23, 1995, a hearing was held before the Honorable Robert Young, Circuit Judge. The Circuit Court's order noted that Petitioner withdrew any issue as to whether the instant vocational institution was a "school" and stated that Petitioner attacked the facial validity of the statute. By doing so, Petitioner argued the time period listed, between the hours of 6 a.m. and 12 a.m., is unconstitutional on its face and as applied to his sale at 11:46 p.m.

On June 26, 1995, the Circuit Court granted the motion to dismiss. Noting the precursor to the current statute regulating the hours of the sale of alcohol, the Circuit Court found the language used in the instant statute in question to be used incorrectly. The Circuit Court also found the statute in question, section 893.13(1)(A)1.(c), was equally applicable on weekends,

holidays, and over summer vacation when schools are not in session. Thus, the Circuit Court found the term "12 a.m." ambiguous to people of common intelligence and declared the provision to be unconstitutionally vague. The State timely filed a notice of appeal on June 29, 1995.

On March 27, 1995, the Second District Court of Appeal issued an opinion in Mr. O'Neal's case. The Second District reversed the order of the Circuit Court, with the only language of the opinion being "Reversed. See Jennings v. State, 21 Fla. L. Weekly D264 (Fla. 1st DCA Jan. 26, 1996)."

SUMMARY OF THE ARGUMENT

When the Second District Court of Appeal reversed the opinion of the Circuit Court expressly declaring this particular state statute to be unconstitutionally vague, it declared valid this particular state statute so as to allow this Court the ability to invoke jurisdiction in this case. These issues attacking the constitutionality of this particular statute are also being presented to this Court in an appeal from the First District Court of Appeals. Although jurisdiction is still pending at this time, it is possible this Court will have accepted jurisdiction on that case by the time this case comes before the Court on the question of jurisdiction. Thus, this Court can also accept this case inasmuch as it will have the same issues pending before it.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN State v. O'Neal, Case No. 95-2732 (Fla. 2d DCA March 27, 1996), EXPRESSLY DECLARES VALID A STATE STATUTE?

Under Florida Rules of Appellate Procedure 9.030(a)(2)(A)(i), this Court may exercise its discretionary powers to accept a case for review wherein a district court's decision expressly declares valid a state statute. In Mr. O'Neal's case, the constitutionality of the possession or sale of cocaine within 1000 feet of a school between the hours of 6 a.m. and 12 a.m. was attacked on both the trial court and district court of appeals levels. The Petitioner's Answer Brief filed in the Second District Court of Appeal supported the Circuit Court's Order declaring section 893.13(1)(A)1.(c) to be unconstitutionally vague. Further, the Answer Brief filed on behalf of Petitioner also argued that even assuming, arguendo, the statute was not unconstitutionally vague, the rule of lenity still required it to be construed in the way most favorable to the accused. The Second District Court of Appeals rejected both the Circuit Court order and the rule of lenity argument, relying solely on the First District Court of Appeals decision in Jennings v. State, 21 Fla. L. Weekly D264 (Fla. 1st DCA January 26, 1996).

Jennings held that section 893.13(1)(c), Florida Statutes (1993), was not unconstitutionally vague insofar as it uses the term "12 a.m." in the definition of an enhanced punishment provision.

The First District Court of Appeals held the time period set forth in the statute "between the hours of 6 a.m. and 12 a.m.," means between 6 a.m. and Midnight; because the Court interpreted the term "12 a.m." to mean Midnight "within the context of the statute."

The question in both Jennings and the instant case was whether the phrase "12 a.m." in section 893.13(1)(c) violates the Due Process Clauses of the United States and Florida Constitutions because "men of common intelligence must necessarily guess at it's meaning and differ as to its application." Connally v. General Const. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); State v. Thomas, 616 So. 2d 1198 (Fla. 2d DCA 1993).

As the Second District Court of Appeal recently stated in State v. Green, 21 Fla. L. Weekly D459 (Fla. 2d DCA February 14, 1996), "Although a layperson relying upon common sense could reject this argument on the basis that it is just silly, lawyers and judges do not always have the luxury of relying on common sense."

Even if this Court determines the ambiguity present in section 893.13(1)(A)1.(c), does not to rise to the level of unconstitutionality, the rule of lenity should apply. Brown v. State, 629 So. 2d 841 (Fla. 1994), recently addressed the vagueness principle with respect to a closely related statute, section 893.13(1)(i), Florida Statutes (Supp. 1990), and found a term unconstitutional because of the rule of lenity. Brown, 629 So. 2d at 842-43. In Perkins v. State, 576 So. 2d 1310 (Fla. 1991), this Court explained in great detail the Due Process and statutory principles embodied in the rule of lenity, stating that to the extent that definiteness is

lacking, a statute must be construed in the manner most favorable to the accused. Perkins, 576 So. 2d at 1312-1313 (citing Palmer v. State, 438 So. 2d 1, 3 (Fla. 1983); Ferguson v. State, 377 So. 2d 709 (Fla. 1979)).

The Perkins court acknowledged the rule of strict construction required it to adhere to the stricter sense of statutory language. Thus, to the extent that a word or phrase, like "12 a.m." in the instant case is vague or ambiguous, "the district court was under an obligation to construe it in the manner most favorable to the accused. Art. I § 9, Art II, § 3, Fla. Const.; § 775.02(1), Fla. Stat. (1987); Brown [v. State, 258 So. 2d 16 (Fla. 1978)]; Palmer [v. State, 438 So. 2d 1 (Fla. 1983)]; [State ex. rel. Lee v. Buchanan, 191 So. 2d 33, 36 (Fla. 1966)]." Perkins, 576 So. 2d at 1313. These cases require the rule of lenity to be employed to strictly construe this statute. The Jennings court even acknowledged the statute in question in the instant case relied on a slightly vague or ambiguous term; even if it did not rise to the level of unconstitutionality. Id. at D264.

Thus, even assuming the phrase "12 a.m." does not render the statute unconstitutionally void as violating Due Process, according to the rule of lenity, this Court should construe the term "12 a.m." in the light most favorable to the accused and determine it to mean Noon and not Midnight. Because the Second District Court of Appeal rejected all constitutional attacks made on this particular statute, it declared valid this statute. This Court may

exercise its discretionary review powers and accept jurisdiction over this case.

ISSUE II

WHETHER THE ISSUES IN O'NEAL ON THE CONSTITUTIONALITY OF SECTION 893.13-(1)(A)1.(c) ARE PRESENTLY PENDING BEFORE THIS COURT IN OTHER CASES?

As stated above, the First District Court of Appeal decided the issue pertinent to this case in Jennings v. State, 21 Fla. L. Weekly D264 (Fla. 1st DCA January 26, 1996). A Notice to Invoke this Court's Discretionary jurisdiction was also filed in Jennings. The current style for that case is Jennings v. State, Florida Case Number 87,587.

By the time this Court must decide whether to accept or reject jurisdiction over Mr. O'Neal's case, it will most likely have decided on the jurisdictional issue in the Jennings case. If this Court accepts jurisdiction on the Jennings case from the First District Court of Appeal, it should also accept jurisdiction over Mr. O'Neal's case. See, Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

In light of the forgoing reasons, arguments, and authorities, petitioner has demonstrated the Second District Court of Appeal has expressly declared valid a state statute so as to invoke discretionary review. Petitioner has also demonstrated that the issue in question is also presently pending before this Court on its discretionary jurisdiction and may have been accepted by the time this brief is considered so as to invoke discretionary review in this manner.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. EUGENE R. O'NEAL, Appellee.	CASE NO. 95-02732

Opinion filed March 27, 1996.

Appeal from the Circuit Court for Polk County; Robert A. Young, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, Bartow, and Wayne S. Melnick, Assistant Public Defender, Bartow, for Appellee.

PER CURIAM.

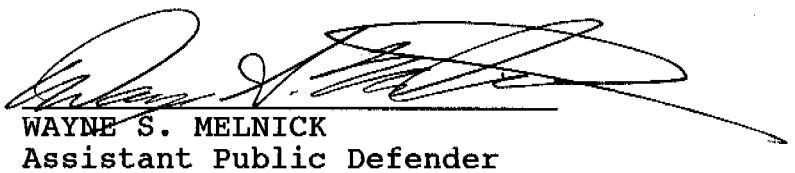
Reversed. See Jennings v. State, 21 Fla. L. Weekly D264 (Fla. 1st DCA Jan. 26, 1996).

THREADGILL, C.J., CAMPBELL and FRANK, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16 day of May, 1996.

Respectfully submitted,



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